Supreme Court, U. S.
FILED
DEC 11 1980
MICHAEL RODAK, JR., CLERK

No. 80-945

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

BRYCE N. HARLOW and
ALEXANDER P. BUTTERFIELD,
Petitioners,

v.

A. ERNEST FITZGERALD,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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December 11, 1980

QUESTIONS PRESENTED

1. Whether the district court's denial of petitioners' defense of immunity from civil damages is appealable under the exception to 28 U.S.C. § 1291 enunciated in *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949).

2. Whether petitioners, as senior advisers to the President of the United States, should be subject to the risk of trial and civil damages from a person claiming injury from an adverse personnel decision of a federal executive department.

3. Whether the lower courts, in routinely requiring a trial upon the defense of qualified immunity, have thereby vitiated the defense and thwarted this Court's decision in *Butz v. Economou*, 438 U.S. 478, 507-08 (1978).

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A. ERNEST FITZGERALD,
Respondent.[1]

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Bryce N. Harlow and Alexander P. Butterfield petition this Court for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit.

OPINIONS BELOW

The district court's order of March 26, 1980 (App. A, *infra*, 1a-10a) denying the petitioners' motion for summary

[1] The only other party to this proceeding in the court of appeals was petitioners' co-defendant, Richard Nixon, who is separately represented and who filed on May 14, 1980 a petition to this Court for a writ of certiorari in this case, *Nixon v. Fitzgerald*, No. 79-1738.

judgment is not yet officially reported; neither is the order of the court of appeals granting respondent's motion to dismiss the appeal of the district court's order (App. B, *infra*, 11a-12a).

JURISDICTION

The district court's order denying petitioners' motion for summary judgment was entered on March 26, 1980 and was timely appealed to the United States Court of Appeals for the District of Columbia Circuit. Citing *Halperin v. Kissinger*, 606 F.2d 1192 (D.C. Cir. 1979), as the dispositive law on the issue being appealed, respondent on April 14, 1980 filed a motion seeking either dismissal of the appeal or summary affirmance of the district court order. The motion to dismiss was granted on April 30, 1980 and a motion for rehearing was denied on July 14, 1980 (App. C, *infra*, 13a-14a). On October 4, 1980, the Chief Justice extended the time within which petitioners could file a petition for writ of certiorari through December 11, 1980. The jurisdiction of this court to review this case is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The issue of appealability involves 28 U.S.C. § 1291. Respondent's claims, against which petitioners assert official immunity, are based upon the First Amendment, 5 U.S.C. § 7211 and 18 U.S.C. § 1505.[2] The texts of these Constitutional and statutory provisions are reprinted in Appendix D, *infra*.

STATEMENT OF THE CASE

This case presents for review an issue of critical importance to the effective functioning of government: the scope of immu-

[2] Mr. Fitzgerald's claim for relief under the District of Columbia common law, *see* App. A, *infra*, at 2a, has been abandoned. *See* Respondent's Supplemental Brief at 2 (May 14, 1980), *Nixon v. Fitzgerald*, No. 79-1738.

nity from civil damages of senior advisors to the President of the United States. The case grows out of a 1969 reorganization of the Department of the Air Force that resulted in the elimination of respondent's civil service position. Although his claims against Air Force officials have failed, respondent asserts that petitioners are liable in money damages for allegedly conspiring to arrange the job elimination and to obstruct any potential rehiring.

Petitioners' Roles in the White House.

Mr. Harlow served as President Nixon's top aide for Congressional matters and had broad authority from the President to contact government agencies and White House staff with regard to Congressional attitudes and strategy. His original title was Assistant to the President, but on November 4, 1969, as a reflection of broadened responsibilities, his role was given Cabinet-level status as Counsellor to the President. Since he was charged with helping to develop and advance the President's interests in a wide range of Congressional matters, Mr. Harlow had daily contact with other Cabinet members and typically received hundreds of telephone calls a day. Mr. Harlow served as Counsellor until December 9, 1970, and did not return to the White House until July 1, 1973, when he served again as Counsellor for a nine-month period until April 14, 1974.

Mr. Butterfield served as Deputy Assistant to the President and on November 4, 1969 assumed the additional post of Secretary to the Cabinet. He continued in both positions until March 14, 1973, when he became Administrator of the Federal Aviation Administration. Although not officially in a direct policy making position, as a procedural coordinator for policy development and deputy to the President's Chief of Staff, Mr. Butterfield was typically required to express his recommendations to the President and the President's principal assistants on many matters of White House concern.

Respondent's Loss of Employment.

In the closing days of the Johnson administration respondent A. Ernest Fitzgerald, a civilian cost analyst in the Department of the Air Force, testified to a Congressional committee on anticipated cost overruns on the Air Force's C-5A transport

plane. President Nixon's appointee as Air Force Secretary, Dr. Robert Seamans, wanted to reorganize the Department of the Air Force, one consequence of which would be to eliminate Mr. Fitzgerald's position. Knowing that Mr. Fitzgerald had ingratiated himself with some members of Congress, Dr. Seamans called Mr. Harlow on May 9, 1969 to inquire about possible repercussions on Capitol Hill if Mr. Fitzgerald's job were eliminated. Mr. Harlow's aide called back to say that it was "not a good time to cause trouble on the Hill."

Six months later, on November 3, 1969, and almost a year after Mr. Fitzgerald's testimony, Dr. Seamans announced an Air Force reorganization and "reduction in force." This plan entailed, among other things, the elimination of Mr. Fitzgerald's job. The decision to adopt the reorganization plan was reached by Dr. Seamans without any White House influence or involvement. As a courtesy to Mr. Harlow, Dr. Seamans called him the next day to inform him of the reorganization and its consequences. The elimination of Mr. Fitzgerald's position became effective on January 5, 1970. In anticipation of the President's being asked a question on the Fitzgerald matter at an upcoming press conference, the White House Press Office in January inquired of Mr. Butterfield as to whether the Administration had formulated a position on this matter. In response, Mr. Butterfield wrote a memo on January 20, 1970 to the White House Chief of Staff informing him of the inquiry. In the memo, Mr. Butterfield said that, since Mr. Fitzgerald should "be given very low marks in loyalty," the White House should not interfere with the Air Force's decision in the matter. The memo was not distributed to anyone in the Air Force or Defense Departments.

On January 20, 1970, Mr. Fitzgerald appealed his termination to the Civil Service Commission, and in late 1973, by order of the Commission, Mr. Fitzgerald was reinstated to a comparable Air Force position with back pay.[3] Although the

[3] After reinstatement, Mr. Fitzgerald filed another appeal with the Civil Service Commission claiming that his new position in the Department of the Air Force was not equivalent to his former position. After hearings, the Commission ruled that the reinstated position was equivalent, and Mr.

(*footnote continues*)

Commission found that the reduction in force and concomitant elimination of Mr. Fitzgerald's position were improperly based on personal factors unique to him, it also held that "the evidence of record does not support [Fitzgerald's] allegation that his position was abolished . . . in retaliation for his [Congressional] testimony." *Appeal of A. Ernest Fitzgerald* at 16 (Civil Service Comm., Sept. 18, 1973).

Respondent's Civil Suit.

This case began almost seven years ago. Claiming that the Commission's order was insufficient compensation, Mr. Fitzgerald initiated a civil action in federal district court in January, 1974 against Mr. Butterfield, Dr. Seamans, Secretary of Defense Melvin Laird, and other high-ranking Air Force and Defense Department officials, seeking compensatory and punitive damages for the allegedly retaliatory firing. The district court granted defendants' motion for summary judgment based on the statute of limitations, since the action had been commenced more than three years after Mr. Fitzgerald's job had been abolished. *Fitzgerald v. Seamans*, 384 F. Supp. 688 (D.D.C. 1974) (Gesell, J.). The court of appeals affirmed the summary judgment as to the Air Force and Defense Department defendants who were directly involved in the Fitzgerald matter. The dismissal was reversed only as to Mr. Butterfield on the ground that Mr. Fitzgerald had no reason to know prior to 1973 of any White House involvement in the decision to abolish his position. *Fitzgerald v. Seamans*, 553 F.2d 220 (D.C. Cir. 1977).

Following this reversal as to Mr. Butterfield, the parties embarked on extensive discovery proceedings, in the course of which it emerged that President Nixon and Mr. Harlow might

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(*footnote continued*)

Fitzgerald appealed this determination to the district court, where the case is still pending. *Fitzgerald v. Hampton*, Civ. No. 76-1486 (D.D.C.). That case is but one of a number of lawsuits, in addition to the instant one, commenced by Mr. Fitzgerald relating to the loss of his job. *See, e.g., Fitzgerald v. Staats*, 578 F. 2d 435 (D.C. Cir.), *cert. denied*, 439 U.S. 1004 (1978); *Fitzgerald v. United States Civil Service Commission*, 554 F.2d 1186 (D.C. Cir. 1977); *Fitzgerald v. Hampton*, 467 F. 2d 755 (D.C. Cir. 1972).

have been peripherally involved in the Fitzgerald matter. In September, 1978, the district court accordingly permitted the filing of a Second Amended Complaint adding President Nixon and Mr. Harlow as defendants.

Denial of Summary Judgment on the Immunity Issue.

Despite six years of discovery, Mr. Fitzgerald failed to uncover any evidence showing that petitioners had in any way initiated or approved the Air Force reorganization or had initiated any contact with the Air Force or Defense Departments regarding the Fitzgerald matter. Accordingly, following the close of the protracted liability discovery, the petitioners moved again for summary judgment, on the grounds, *inter alia*, that a grant of absolute immunity was "essential for the conduct of the public business," under *Butz v. Economou*, 438 U.S. 478, 507 (1978), or alternatively, that they were entitled to qualified immunity under *Butz* because Mr. Fitzgerald had failed to show any evidence of malice or bad faith on the part of petitioners.

On March 26, 1980, the district court, citing *Halperin v. Kissinger*, 606 F. 2d 1192 (D.C. Cir. 1979), *cert. granted*, 446 U.S. 951 (1980) (No. 79-880), as the controlling law in the Circuit, denied petitioners' motion for summary judgment. App. A. at 2a-3a. Rejecting petitioners' claim of absolute immunity, the district court ruled that since "[g]enuine issues of fact remain" as to (among other things) the question of malice and bad faith, the claim of qualified immunity must be submitted to the jury. *Id.*

The petitioners appealed the district court's rejection of their immunity defense to the court of appeals; the respondent filed a motion alternatively seeking dismissal of the appeal or summary affirmance of the district court's order. The court of appeals, without stating the basis for its decisions, on April 30, 1980 granted respondent's motion to dismiss the appeal, and on July 14, 1980 denied petitioners' petition for rehearing and suggestion for rehearing *en banc*. App. C, *infra*, 13a-14a.

In refusing to rule on petitioners' claim of qualified immunity, as mandated by this Court in *Butz*, the district court has

effectively deprived petitioners of this defense, since the very premise of any immunity defense is that the case "need not proceed to trial, but can be terminated on a properly supported motion for summary judgment based on the defense of immunity." *Butz v. Economou, supra,* 438 U.S. at 508.

REASONS FOR ALLOWANCE OF THE WRIT

This case warrants review by this Court to resolve conflicting rulings by the district and circuit courts that threaten to undermine the defenses of absolute and qualified immunity recognized by this Court in *Butz* as "essential for the conduct of the public business." *Id.* at 507.

Specifically, the court of appeals' dismissal of petitioners' appeal on the apparent ground that the district court's denial of summary judgment on the immunity issue was not appealable, is contrary to the decisions of this Court and other courts of appeals.

Moreover, the Court is presented here with an opportunity to address two important aspects of immunity not resolved by its decision in *Butz*. First, this case adds a significant dimension to the claims of absolute immunity of the President and senior Presidential advisers asserted in the separate petition in this case filed by President Nixon (No. 79-1738) and in *Halperin v. Kissinger, supra,* in which this Court has already granted certiorari (No. 79-880).[4] Second, this case affords an opportunity to clarify the role of the lower courts in ruling upon pretrial motions based on qualified immunity. Numerous decisions of the lower courts in this and other cases have demonstrated that such clarification is essential if the defense of qualified immunity is to have any vitality.

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[4] In June, 1980, petitioners (at the time represented by the Solicitor General) filed a Memorandum with this Court requesting that it hold Nixon's petition in this case (No. 79-1738) pending the Court's decision in *Kissinger v. Halperin, cert. granted,* 446 U.S. 951 (1980) (No. 79-880).

I. The Denial of the Immunity Defenses Was a Final, Collateral Order, Appealable under *Cohen v. Beneficial Industrial Loan Corp.*

Since this Court's 1949 decision in *Cohen v. Beneficial Industrial Loan Corp.*, it has been recognized that the grant of jurisdiction afforded the courts of appeals to review "final decisions of the district courts" under 28 U.S.C.§ 1291 is to be given a "practical rather than a technical construction." 337 U.S. 541, 546 (1949). Accordingly, under the *Cohen* exception to § 1291 as recently summarized by this Court in *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468-69 (1978), pre-judgment orders of the district courts may be appealed if they (i) conclusively determine the disputed question, (ii) resolve an important question completely separate from the merits of the action, and (iii) are effectively unreviewable on appeal from a final judgment.

In recent years this Court has on at least two occasions expressly held that denials of immunity defenses are appealable under the *Cohen* collateral order doctrine. *Helstoski v. Meanor*, 442 U.S. 500 (1979) (immunity under the Speech and Debate Clause); *Abney v. United States*, 431 U.S. 651 (1977) (immunity on ground of double jeopardy). Moreover, until the court of appeals dismissal in this case, the courts of appeals that had considered precisely this issue had unequivocally ruled that, in the words of the Third Circuit, a pre-trial

> denial of the defendants' motions for summary judgment on the issue of absolute immunity is appealable under the *Cohen* collateral order doctrine. Appellate review . . . [prior to trial] will conclusively determine the disputed question and will resolve an important issue completely separate from and collateral to the question of the defendants' guilt or innocence. Moreover, the denial of absolute immunity is effectively unreviewable on appeal. *Since the right which absolute immunity protects is the right not to be subjected to trial, it is irretrievably lost if appellate review must await final adjudication on the merits.* [*Forsyth v. Kleindienst*, 599 F.2d 1203, 1208-09 (3d Cir. 1979),

petition for cert. pending sub nom. Mitchell v. Forsyth, No. 79-1120 (filed Jan. 18, 1980) (assertion of absolute immunity by Executive Branch officials) (emphasis added).]

The Second Circuit is in accord with the Third on the issue, having recently denied a plaintiff's motion to dismiss an appeal of a pre-trial denial of an immunity defense. *Clark v. United States,* 624 F.2d 3, 4 (2d Cir. 1980) (briefing permitted by court of appeals on claim of immunity by former President Nixon; appeal stayed pending this Court's decision in *Halperin*). Finally, other panels of the District of Columbia Circuit itself have expressly recognized the immediate appealability under *Cohen* of a district court's denial of an immunity defense. *See Briggs v. Goodwin,* 569 F. 2d 10 (D.C. Cir. 1977), *cert. denied,* 437 U.S. 904 (1978) (assertion of witness and prosecutorial immunity); *McSurely v. McClellan,* 521 F.2d 1024 (1975), *aff'd in pertinent part en banc,* 553 F.2d 1277, 1283-84 n.18 (D.C. Cir. 1977), *cert. dismissed,* 438 U.S. 189 (1978) (immunity under Speech and Debate Clause). The court in *Briggs* recognized that since

> *the purpose behind absolute immunity is as much to protect the relevant persons from a trial on their actions* as it is to protect them from the outcome of trial .... [T]he full protection of absolute immunity would be irreparably lost if review had to await final judgment. [569 F.2d at 59 (emphasis added).]

In refusing to review the district court's denial of petitioners' immunity claim,[5] the appellate court in this case must have ignored this Court's holdings in *Helstoski* and *Abney* as to appealability of immunity denials. As the court's dismissal was in conflict with this Court's decisions, and with the rulings on the very point by two other circuits and other panels of the

[5] As previously noted, p. 6, *supra,* respondent had moved alternatively for summary affirmance or for dismissal of the appeal of the district court order. Since the court of appeals expressly dismissed, it obviously did *not* decide as a matter of law that petitioners were not entitled to immunity (presumably, had it desired to do so, it would have affirmed); it simply ruled that the issue could not be appealed.

District of Columbia Circuit itself, it is especially imperative that this Court exercise its supervisory powers to review the court of appeals decision.[6]

II. This Case Presents an "Exceptional Situation" Where "Absolute Immunity Is Essential for the Conduct of the Public Business" under *Butz v. Economou.*

While the scope of immunity to be accorded Presidential advisers is now being considered by this Court in *Halperin,*[7] this case presents the issue in a significantly different context, one which draws into focus the difficulties experienced by the lower courts and defendants therein in the wake of this Court's decision in *Butz.* Indeed (as discussed in Point III, *infra*), this case, perhaps more clearly than *Halperin,* illustrates how the Court's expectations in *Butz* have not been fulfilled.

In *Butz,* which involved a damage claim for allegedly improper initiation of administrative proceedings by the Department of Agriculture against a registered commodity futures commission merchant, the defendants unsuccessfully sought to invoke the absolute immunity granted in *Barr v. Matteo,* 360 U.S. 564 (1959). In the *Barr* case this Court had held that a federal official who was acting "within the outer perimeter of [his] line of duty" was absolutely immune from civil action on a state tort claim. 360 U.S. at 575. However, in *Butz* the Court reasoned that since state officials were liable by reason of 42 U.S.C. § 1983 for civil damages for constitutional

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[6] That this Court has the authority under 28 U.S.C. §1254 to grant a writ of *certiorari* in this case is beyond question. Respondent has argued in this Court that this case was not "in" the court of appeals (within the meaning of §1254), "because that court had granted respondent's motion to dismiss for lack of jurisdiction." Brief for Respondent in Opposition at 2, *Nixon v. Fitzgerald,* No. 79-1738. Respondent's concept that this Court has no power to review a court of appeals dismissal for want of jurisdiction is clearly erroneous. *See, e.g., Gardner v. Westinghouse Broadcasting Co.,* 437 U.S. 478 (1978) (certiorari granted to review jurisdictional dismissal by court of appeals).

[7] Petitioners adopt the arguments of the Solicitor General in his Brief for Petitioners, *Kissinger v. Halperin, cert. granted,* 446 U.S. 951 (1980) (No. 79-880), insofar as the same concern the immunity of Presidential advisers.

deprivations, it would be anomalous if federal officials were held to be immune for similar violations. Accordingly, the Court held that

> in a suit for damages arising from unconstitutional action, federal executive officials exercising discretion are entitled only to ... qualified immunity ..., subject to those exceptional situations where it is demonstrated that absolute immunity is essential for the conduct of the public business. [*Butz v. Economou, supra,* 438 U.S. at 507.]

This qualified immunity will be allowed under *Butz* unless the plaintiff can establish (i) that the defendant had no reasonable grounds to believe his action was legal, or (ii) that the defendant acted with malice or bad faith. *Id.* at 497-98, *citing Scheuer v. Rhodes,* 416 U.S. 232, 247-48 (1974).

Decisions on official immunity always involve resolution of the tension between the need for immunity as an essential element for effective functioning of government, and the desire to afford a remedy to persons injured by the acts of public officials. Although the policy underlying immunity is almost self-evident, the words of Judge Learned Hand in this regard are enlightening:

> The justification for . . . [granting immunity] is that it is impossible to know whether the claim is well founded until the case has been tried, and that to submit all officials, the innocent as well as the guilty, to the burden of a trial and to the inevitable danger of its outcome, would dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties. Again and again the public interest calls for action which may turn out to be founded on a mistake in the face of which an official may later find himself hard put to it to satisfy a jury of his good faith. [*Gregoire v. Biddle,* 177 F.2d 579, 581 (2d Cir. 1949), *cert. denied,* 339 U.S. 949 (1950).]

The outcome of attempting to balance immunity for public officials on the one hand, and the vindication of private rights on the other, depends on the weight to be accorded one interest over the other in each circumstance. In the case of prosecutors,

judges and officials exercising quasi-judicial functions, the rationale for immunity has been thought so compelling that these officials have been granted absolute immunity from claims arising under both state law and the Constitution. *Butz v. Economou, supra,* 438 U.S. at 508-17. Indeed, *Butz* extended absolute immunity even to civil service hearing examiners and agency attorneys participating in federal administrative proceedings, on the ground that their positions were "functionally comparable" to those of a judge and prosecutor. *Id.* at 513, 517. In so holding, this Court has recognized the necessity for absolute immunity for public officials involved in the judicial or quasi-judicial processes essentially because of the inhibiting effect the prospect of civil liability might have upon such officials, who are highly visible and exposed to vindictive suits by persons believing they are aggrieved by the officials' performance of their public duties. *Id.* at 508-12.

It is respectfully submitted that the same exigencies that have led this Court to recognize the necessity for absolute immunity for judges and subordinate judicial officials mandate extension of absolute immunity to the President and his senior advisers. The President and his principal advisers obviously are far more exposed to the public than officials in the judicial branch, and their actions or inactions have at least as direct and far-reaching an impact on persons in our society as decisions of judges and prosecutors. Experience has now demonstrated that the President and his senior advisers, such as petitioners here, are as exposed to vindictive or retaliatory litigation as are members of the judiciary.

Advisers to the President of the United States do not of course exercise a quasi-judicial function. The obvious necessity, however, for the flow of information and advice to the President and among members of his staff, unfettered by "the constant dread of retaliation," *Gregoire v. Biddle, supra,* 177 F.2d at 581, is at least as compelling as the need to protect the discretion of officials performing judicial or quasi-judicial functions. Many, if not most, of the matters reaching the White House come to it from an executive department. It is thus an essential function of a Presidential adviser to decide which matters warrant review by the White House staff and the

President himself, as well as to suggest a decision on the merits. In short, the senior White House adviser is daily called upon to "second guess" decisions of executive departments. It is hard to see why this function, with its manifest need for wide-ranging discretion and with its propensity to provoke retaliatory suits by those dissatisfied with the manner of its exercise, should be ranked behind that of officials performing prosecutorial or quasi-judicial functions.

Just as the possibility of anything less than absolute immunity for judicial and prosecutorial officals would have "an adverse effect," *Butz v. Economou, supra,* 438 U.S. at 510, on the judicial system, so too would the elimination of absolute immunity for senior Presidential advisers have an inhibiting effect on the flow of information and ideas within the White House. "It simply defies logic and common experience to suggest that officials will not have [the fear of litigation] in the back of their minds when considering what official course to pursue."[8] *Id.* at 526-27 (Rehnquist, J., concurring and dissenting in part). The Court has previously recognized the affirmative need for the President to obtain uninhibited advice from his senior staff:

> The President's need for complete candor and objectivity from advisers calls for great deference from the courts.
>
> . . .
>
> . . . [There is a] necessity for protection of the public interest in candid, objective, and even blunt or harsh opinions in Presidential decisionmaking . . . . [T]hose who assist the [President] must be free to explore alternatives in the process of shaping policies and making decisions and to do so in a way many would be unwilling to express except privately. These . . . considerations . . . [are] fundamental to the operation of Government and are

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[8] Indeed, in the instant case, respondent seeks in excess of $500,000 in compensatory damages and $3,000,000 in punitive damages. The district court has observed that, if respondent were able to prove his allegations, "there are heavy punitive damages here that [a jury] could award. They could award ten million dollars against Butterfield." Transcript of Pretrial Conference of May 16, 1980 at 157, *Fitzgerald v. Butterfield et al.* (D.D.C.) (Gesell, J.).

inextricably rooted in the separation of powers under the Constitution. [*United States v. Nixon*, 418 U.S. 683, 706, 708 (1974) (privilege for confidential Presidential communications is subordinate only to specific need in criminal prosecution).]

Accordingly, in view of the special function of high-level White House advisers who every day deal with matters of critical importance to the nation, their position should be recognized as one of "those exceptional situations where it is demonstrated that absolute immunity is essential for the conduct of the public business." *Butz v. Economou, supra*, 438 U.S. at 507 (footnote omitted).[9]

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[9] This conclusion is especially warranted here, because one of the reasons advanced by *Butz* for limiting absolute immunity of federal officials—that those who have experienced constitutional deprivations at the hands of federal officials should not be left remediless—is not present in this case. *See Butz v. Economou, supra*, 438 U.S. at 504-06. It can hardly be said that granting petitioners immunity would leave Mr. Fitzgerald remediless. As evidenced by his reinstatement with back pay by order of the Civil Service Commission, he has successfully availed himself of the statutory scheme for federal civil servants injured by improper personnel decisions. Accordingly, in view of the statutory and administrative remedies typically available to redress alleged constitutional torts arising from White House review of an executive department's decisions, allowing absolute immunity in these situations will not leave plaintiffs remediless.

Indeed, in view of the availability of the statutory remedy for respondent, there even is considerable question as to whether he may maintain an implied right of action on the constitutional claims under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). *See Bush v. Lucas*, 598 F. 2d 958, *rehearing denied*, 605 F. 2d 554 (5th Cir. 1979), *vacated and remanded*, 446 U.S. 914 (1980) (mem.) (no *Bivens* cause of action available where federal employee, injured by retaliatory demotion, could pursue administrative remedies). *But cf. Carlson v. Green*, 446 U.S. 14 (1980) (availability of recovery under Federal Tort Claims Act does not preclude *Bivens* action for wrongful death against federal official). The issue of whether respondent could maintain this action in view of the existence of a comprehensive statutory remedy was briefed in the district court in this case, but as the denial of summary judgment on the issue was not immediately appealable under the *Cohen* collateral order doctrine, it was not included in petitioners' notices of appeals to the court of appeals.

III. The Lower Courts Have Unduly Restricted the Defense of Qualified Immunity Envisioned in *Butz v. Economou*, by Routinely Submitting the Issue to Trial.

If senior Presidential advisers faced with allegations of unconstitutional conduct, such as petitioners here, are deemed not entitled to absolute immunity, because their duties as public officials do not constitute a "special function requir[ing] a full exemption from liability," then they will be accorded only qualified immunity. *Butz v. Economou, supra,* 438 U.S. at 507-08. In so holding, the Court asserted that the "principle of only qualified immunity for constitutional violations . . . should prove . . . workable" because the key purpose of immunity (whether absolute or qualified)—to avoid a trial on the merits—would be achieved by summary disposition of unsupported claims. *Id.* Thus, the majority in *Butz* counseled the lower courts:

> Insubstantial lawsuits can be quickly terminated by federal courts alert to the possibilities of artful pleading. . . . [D]amages suits concerning constitutional violations need not proceed to trial, but can be terminated on a properly supported motion for summary judgment based on the defense of immunity . . . . In responding to such a motion, plaintiffs may not play dog in the manger; and firm application of the Federal Rules of Civil Procedure will ensure that federal officials are not harassed by frivolous lawsuits. [*Id.*]

Unfortunately, the lower courts have plainly misinterpreted this mandate to dismiss cases where appropriate before trial on the qualified immunity defense, and have generally declined to rule on motions for summary judgment on the ground that the claim of malice or bad faith automatically raises a triable issue of fact as to the defendant's state of mind that must be resolved by a jury. The lower courts have treated a plaintiff's mere allegation of malice (occasionally supported by some circumstantial inference) as creating a triable issue of fact sufficient to bar a defendant's motion for summary judgment. It was on this basis that the district court in this case denied petitioners' motion for judgment before a trial on the issue of qualified immunity, and the same result has been

reached in numerous other cases since the *Butz* decision. *See Clark v. United States,* 481 F. Supp. 1086, 1092-93 n.5 (S.D.N.Y. 1979), *appeal dismissed in part and stayed in part,* 624 F.2d 3, 4 (2d Cir. 1980) (mere pleading of malice sufficient to prevent dismissal on qualified immunity ground). *See generally Halperin v. Kissinger,* 606 F.2d 1192 (D.C. Cir. 1979), *cert. granted,* 446 U.S. 951 (1980); *Forsyth v. Kleindienst,* 599 F.2d 1203 (3d Cir. 1979), *petition for cert. pending sub nom. Mitchell v. Forsyth,* No. 79-1120 (filed January 18, 1980); *Smith v. Nixon,* 606 F.2d 1183 (D.C. Cir. 1979), *petition for cert. pending,* No. 79-882 (filed Dec. 7, 1979); *Zweibon v. Mitchell,* 606 F.2d 1172 (D.C. Cir. 1979), *petition for cert. pending,* No. 79-881 (filed Dec. 7, 1979); *Dellums v. Powell,* 490 F. Supp. 70 (D.D.C. 1980).

Judging by their insistence on letting the jury pass upon assertions of qualified immunity, the lower courts have seemingly viewed this Court's opinion in *Butz* as stating "that anytime a plaintiff can paint his grievance in constitutional colors," the defendant will be forced to undergo trial. *Butz v. Economou, supra,* 438 U.S. at 520 (Rehnquist, J., concurring and dissenting in part).

Sitting by designation on the appellate panel, Judge Gesell, the district judge who denied petitioners' motion for summary judgment in this case, pointed out in his concurring opinion in *Halperin v. Kissinger, supra,* that whatever protection was to be afforded by qualified immunity had in fact been rendered almost meaningless:

> If a plaintiff can establish a genuine material issue of fact as to any element of the immunity defense the case will have to proceed to trial. In my view this approach substantially undermines, if not destroys, the immunity doctrine.
>
> . . .
>
> Each suit almost invariably results in officials and their colleagues being subjected to extensive discovery into traditionally protected areas, such as their deliberations preparatory to the formulation of government policy and their intimate thought processes and communications at the presidential and cabinet levels. Such discovery is wide-

> ranging, time-consuming, and not without considerable cost to the officials involved. It is not difficult for ingenious plaintiff's counsel to create a material issue of fact on some element of the immunity defense where subtle questions of constitutional law and a decisionmaker's mental processes are involved. A sentence from a casual document or a difference in recollection with regard to a particular policy conversation held long ago would usually, under the normal summary judgment standards, be sufficient. In short, if these standards are those to be followed in these cases, trial judges will almost automatically have to send such cases to full trials on the merits. [*Halperin v. Kissinger, supra,* 606 F.2d at 1214 (Gesell, J., concurring).]

The instant case is itself an unfortunate and egregious example of how the Court's admonitions in *Butz* to "weed out insubstantial claims," *Butz v. Economou, supra,* 438 U.S. at 527, have proven inadequate. After almost seven years of litigation, and after the close of exhaustive discovery involving countless depositions, Mr. Fitzgerald has been unable to uncover any evidence whatever establishing that petitioners had a part in the decision to eliminate his job or the decision not to rehire him. There is no evidence of a conspiracy to these ends. Yet petitioners have been denied summary judgment because Judge Gesell felt himself bound by the controlling precedent in the District of Columbia Circuit, *Halperin v. Kissinger, supra.* But for that precedent, the inference is inescapable, in light of his concurring opinion in *Halperin,* that he would have granted petitioners' motion.

To give life to the doctrine of qualified immunity, petitioners urge that the Court recognize that as a practical matter the scheme contemplated in *Butz* has not been followed. The exercise by this Court of its supervisory powers over the federal judicial system is necessary to correct this misunderstanding, to reemphasize the need for appropriate use of summary disposition of qualified immunity claims, and to clarify the circumstances under which summary judgment for a defendant must be granted as a matter of law.

In his previously quoted concurring opinion, Judge Gesell suggested a possible approach to remedying the lower courts' misapplication of *Butz*:

> In order to give the immunity doctrine some genuine force and effect, it appears to me that a plaintiff should be required to make a stronger showing than the Court's opinion requires on the immunity question before being permitted to proceed to trial. I would hold that the plaintiff must establish after the completion of discovery and before the trial commences, not merely the existence of a genuine dispute as to some material issue of fact but also, by the preponderance of the evidence or through clear and convincing evidence, that the official failed to act with subjective or objective good faith. [*Halperin v. Kissinger, supra,* 606 F.2d at 1215 (Gesell, J., concurring).]

If Judge Gesell's suggestions were adopted, a judge would make an ultimate finding of fact on the issue of qualified immunity in accordance with the prescribed evidentiary standard.[10] If the judge found the evidence insufficient to satisfy this standard, the defense of qualified immunity would prevail and summary judgment would be granted. A finding that the evidence satisfied the evidentiary standard could be treated in one of two ways: either this finding could be regarded as a final determination that the defense was not available, in which event only those elements of plaintiff's case other than the immunity issue would go to trial, or the finding could be regarded as simply deciding that the trial should go forward, in which case a determination of the immunity issue would be made *de novo* by the jury. While either of these courses would prevent the misapplication of *Butz,* the requirement that a district judge make an ultimate finding of fact at the pre-trial stage poses potential difficulties.

Accordingly, as an alternative, it would be sufficient for purposes of satisfying the *Butz* admonition for summary disposition to require simply that, on the motion for summary judgment, the judge must determine whether the credible evidence uncovered by the discovery process adds up to a

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[10] This type of pre-trial determination by the judge of mixed legal and factual questions is of course not uncommon. *See, e.g.,* Fed. R. Civ. Pro. 23(c); Fed R. Evid. 104(a) and Advisory Committee note thereto.

substantial showing that the defendants were implicated in the alleged constitutional tort.[11] The difference between this approach[12] and that suggested by Judge Gesell is that the court would be applying a legal standard of sufficiency for the purpose of determining whether or not the trial should go forward, rather than making an ultimate finding of fact. Accordingly, since this approach would give meaning to the qualified immunity defense and avoid the difficulties inherent in pre-trial determinations of fact, petitioners urge the Court to instruct the lower courts that *where the plaintiff has not established after discovery a quantum of evidence sufficient (in view of immunity's purpose of avoiding a trial) to warrant putting the issue to a trial, the judge must grant summary judgment on the ground of qualified immunity.*

Under this suggested standard, in view of the remoteness of petitioners' position from the Air Force Department that made the decision to eliminate Mr. Fitzgerald's job, the absence on the record of any evidence of malice, and the complete lack of evidence linking petitioners with the decision to adopt the Air Force reorganization plan, it should be clear that *as a matter of law* petitioners ought not, on this type of record, be forced to put any issue here to a trial. When this "thin" record is weighed against the fact that Mr. Fitzgerald

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[11] While this Court has expressly resolved the issue of who has the burden of pleading good or bad faith when qualified immunity is raised as a defense, *see Gomez v. Toledo*, 446 U.S. 635 (1980), this Court has not answered the question of who must bear the ultimate burden of persuasion. The decisions of the Courts of Appeals are in conflict on this question. *Compare Gaffney v. Silk*, 488 F.2d 1248, 1250-51 (1st Cir. 1973) *with McCray v. Burrell*, 516 F.2d 357, 370 (4th Cir. 1975), *cert. dismissed*, 426 U.S. 471 (1976). Thus, the instant case also presents an opportunity for this Court to resolve that conflict and determine what the ultimate burden of persuasion should be.

[12] If the Court establishes the suggested rule of law requiring judges to grant summary judgment on the ground of qualified immunity in appropriate cases, it would follow that a ruling by a district court judge on such a motion would be immediately appealable as a collateral order under the three-part test of *Cohen* discussed in Point I, *supra*. Since the key function of any immunity defense—whether absolute or qualified—is to avoid a trial on the merits, a pre-trial denial of qualified immunity, no less than a denial of absolute immunity, must be immediately appealable.

has successfully availed himself of the very remedy established by Congress to redress the alleged injury, the above conclusion is even more forcefully warranted.

Accordingly, if they are not deemed entitled to absolute immunity under the "special functions" category of *Butz v. Economou, supra*, 438 U.S. at 508, then petitioners request the Court to clarify its rule in *Butz* for the benefit of the lower courts and the federal officials who are the targets of similar suits, to the end that where the prospect of proof of the allegations against defendants is as attenuated as it is in this case against petitioners, summary judgment for defendants on the ground of qualified immunity must be awarded.

CONCLUSION

In view of the erroneous dismissal of petitioners' appeal by the court of appeals and the erroneous denial by the district court of petitioners' motion for summary judgment on the ground of official immunity, the Court should allow the writ of *certiorari*.

As suggested by petitioners in their Memorandum of June 1980 filed in connection with President Nixon's petition for a writ of *certiorari* in this case (No. 79-1738), the Court may wish to consider this case in connection with *Halperin*. Should the Court find the defendants in *Halperin* entitled to absolute immunity, the Court might appropriately grant *certiorari* here and dispose of this case by means of a summary disposition on the merits in light of its *Halperin* decision. Alternatively, should the Court find that the defendants in *Halperin* are not to be accorded absolute immunity or that it is unnecessary to reach the immunity issue, petitioners respectfully submit that the Court should grant this petition in order to resolve conflicting lower court rulings and to give full effect to its decision in *Butz v. Economou*.

Respectfully submitted,

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December 11, 1980

APPENDICES

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APPENDIX A

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No. 74-178
[Filed Mar 26 1980]

A. ERNEST FITZGERALD,

Plaintiff,

v.

ALEXANDER P. BUTTERFIELD, et al.,

Defendants.

ORDER

Upon consideration of defendants' motions for summary judgment, the opposition thereto, and the entire record herein, it is hereby

ORDERED that defendants' motions are denied in the following respects:

A. Causes of Action

For reasons set forth more fully in the Court's Order of April 27, 1979, plaintiff has stated the following triable causes of action against each of the three defendants.

1. Plaintiff states a cause of action for damages under the First Amendment to the United States Constitution based on defendants' alleged retaliation for plaintiff's having exercised his rights of free speech and petition.

2. Plaintiff states a cause of action for damages under 5 U.S.C. § 7211 (1976 & Supp. II, 1978).

3. Plaintiff states a cause of action for damages under 18 U.S.C. § 1505.

4. Plaintiff states a cause of action under District of Columbia law for intentional infliction of mental distress by extreme and outrageous conduct.

5. Plaintiff states a cause of action under District of Columbia law for intentional interference with (existent and prospective) economic advantage.

The gravamen of the alleged conspiracy is the participants' knowing intent to terminate plaintiff's employment with the Air Force and to prevent his reinstatement as a government employee in retaliation for his congressional testimony. Summary judgment for a defendant at this stage requires him to show either that he lacked knowledge that the adverse personnel actions taken were retaliatory, or that he lacked an intent to approve this specific aspect of government conduct, or that he took no action in furtherance of such a dismissal and/or obstruction. Plaintiff has established genuine issues of fact as to each of these matters regarding the conduct of all three defendants. Thus, these are issues for the jury to resolve.

B. Immunity

Absolute immunity is not available either to defendant Nixon as a former President or to defendants Harlow and Butterfield. *Butz v. Economou*, 438 U.S. 478 (1978); *Halperin v. Kissinger*, 606 F.2d 1192 (D.C. Cir. 1979), *petition for cert. filed*, 48 U.S.L.W. 3467 (Dec. 7, 1979). In order to establish qualified immunity, each defendant must show that he was acting "within the outer perimeters" of his responsibilities, that any action taken was performed without malicious intent to deprive plaintiff of constitutional or other rights, and that it was reasonable to believe that any action taken was legal. *Butz v. Economou*, *supra*; *Halperin v. Kissinger*, *supra*. *See Wood v. Strickland*, 420 U.S.

308 (1975). Genuine issues of fact remain as to the scope of each defendant's responsibilities, the objective reasonableness of any beliefs each may have had concerning the legality of his alleged conduct in the Fitzgerald matter, and the subjective good faith underlying such conduct.

In analyzing the reasonableness of defendants' beliefs as predicates to the alleged wrongful conduct, the Court has considered the unique demands placed on the time and energies of defendant Nixon as President. *Scheuer v. Rhodes*, 416 U.S. 232, 247-49 (1974); *Halperin v. Kissinger*, *supra*, 606 F.2d at 1212-13. There is, however, ample evidence in the record that Fitzgerald's predicament was not simply one of a disgruntled civil servant. Both members of Congress and the press identified plaintiff's case as being of great public importance throughout 1969. Factual circumstances surrounding his termination were repeatedly raised for the President's attention. Moreover, the conduct complained of has long been prohibited by criminal statute, a statute to which Mr. Nixon personally gave strong support while a member of the United States Senate. The Court is unable to conclude at this time that Nixon's beliefs regarding any alleged failure to meet a statutory or constitutional obligation imposed on him were reasonable as a matter of law.

C. Punitive Damages

Punitive damages may be awarded against any defendant whose actions in contravention of statutory or common law have been shown to be malicious or in reckless disregard for the rights of others. *Knippen v. Ford Motor Co.*, 546 F.2d 993, 1002 (D.C. Cir. 1976); *Nader v. Allegheny Airlines, Inc.*, 512 F.2d 527, 549-51 (D.C. Cir. 1975), *reversed on other grounds*, 426 U.S.

290 (1976). Because genuine issues of fact remain with respect to the subjective good faith underlying each defendant's conduct, it has not been established that such damages are unavailable as a matter of law. Should the facts of this case developed at trial warrant an award of punitive damages, such an award would be recoverable at common law or under plaintiff's statutory claims. A similar recovery based on any finding of First Amendment violations does not appear to be constitutionally interdicted. *See generally Dellums v. Powell*, 566 F.2d 167, 209 (D.C. Cir. 1977) (Leventhal, J. concurring); *Payne v. Government of Dist. of Columbia*, 559 F.2d 809, 827-27 (Tamm, J. concurring).

D. Statute of Limitations

The motions based on the Statute of Limitations are denied for reasons set forth in a separate Memorandum filed herewith.

It is further

ORDERED that defendants' motions for summary judgment are granted in the following respects:

1. Plaintiff having voluntarily withdrawn his claim under the Fifth Amendment to the United States Constitution, this claim is hereby dismissed.

2. Plaintiff having withdrawn his contention that defendants are in any way liable in connection with initiating the 1969 investigation of him by the Air Force Office of Special Investigations ("OSI"), this matter shall not be prosecuted at trial. Evidence regarding the subsequent use of OSI investigation results or charges shall not be admissible at trial absent a clear showing of relevance and good cause.

It is further

ORDERED that the dates and times for pretrials and trials as set by this Court's Order of November 19,

1979, are modified to reflect a change in the time of Pretrial No. 2 and the date of the trial:

First Pretrial: May 2, 9:30 a.m.
Second Pretrial: May 12, at *2:00* p.m.
Final Pretrial: May 22, at 9:30 a.m.
Trial: June *4*, at 9:30 a.m.

/s/ Gerhard A. Gesell
United States District Judge

March 26, 1980

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 78-178

[Filed Mar 26 1980]

A. ERNEST FITZGERALD,

Plaintiff,

v.

ALEXANDER P. BUTTERFIELD, et al.,

Defendants.

MEMORANDUM REGARDING STATUTE OF LIMITATIONS

Plaintiff, a former Air Force weapon systems analyst, seeks relief against former President Nixon and two White House associates in this civil conspiracy damages action stemming from his discharge in 1969. Following years of litigation against a dwindling number of government officials, the Court has for consideration separate motions for summary judgment made on behalf of these three remaining defendants. On the basis of exhaustive discovery, defendants individually claim that plaintiff is barred from proceeding by the applicable three-year Statute of Limitations, D.C. Code § 12-301(8) (1973).

One defendant, Butterfield, was previously dismissed by reason of the Statute of Limitations but reinstated after a protracted appeal, *Fitzgerald v. Seamans*, 553 F.2d 220, (D.C. Cir. 1977). Following remand, defendants Nixon and Harlow were added and the cause of action given greater specificity by a Second Amended Complaint filed September 14, 1978. After limited discovery, the Court on April 27, 1979, denied motions for summary judgment addressed to the Statute of

Limitations issue. It was, however, recognized that further consideration of this vexing issue might eventuate following the additional detailed discovery that has since ensued. The present motions were thoroughly briefed and fully argued upon completion of discovery and preliminary to a series of noticed pretrials that will precede trial in June.

In dealing with these motions this Court is governed by the mandate from the Court of Appeals. Plaintiff's original complaint seeking damages against representatives of the Air Force was found to be time-barred, but, on remand, Butterfield survived as a defendant. The Court of Appeals held that Butterfield, a member of the White House staff, was "a person of influence in a different center of power." Although he was alleged to have conspired with the Air Force defendants, he was held for trial because the record before the appellate court did not compel the view that plaintiff should have been aware of "White House deliberations concerning his government employment" prior to1973. The Court of Appeals recognized that while new Air Force defendants could not be added plaintiff could, by reason of his John Doe allegations, add new White House defendants "subject to the requirement of due diligence." It also was noted that Butterfield's own involvement could be re-examined upon a fuller factual record in the light of the due diligence standard.

As the action now stands, plaintiff proposes to proceed against the three movants, all participants in the White House "center of power." He claims that they conspired with Air Force representatives and with others in the White House to bring about his dismissal by the Air Force and to block his reinstatement to government service in the immediate aftermath of the termination.

Discovery into White House involvement was effectively curtailed in the spring of 1974, following early summary judgment motions from the Air Force defendants. Plaintiff's first meaningful opportunity to resume his inquiries on this score came after remand, and it is not seriously disputed that he proceeded with due diligence from that point. Defendants focus instead on the three-year period following the final events fixing alleged liability, which occurred early in 1970. They argue that by early 1973, plaintiff was on clear notice of facts and circumstances enabling him intelligently to prosecute his cause of action. His failure to proceed at that time is said to bar this action against any White House officials, including the President.

An assessment of plaintiff's diligence in ferreting out White House involvement must take account of the appellate court's conclusion that plaintiff was thwarted by the Air Force's successful claim of executive privilege. The privilege, invoked by Secretary Seamans before the Civil Service Commission when inquiry was directed toward White House participants, could only have been authorized by or on behalf of the President. In other respects, plaintiff's inquiries also have been frustrated or ignored in the interests of White House secrecy.

There is still no proof that plaintiff could have proceeded more diligently against Butterfield. Although Butterfield did nothing himself to conceal his involvement, his alleged participation was not even suspected until his memorandum surfaced during the Senate Watergate hearings in the summer of 1973. Having been shielded from plaintiff's inquiries by the broad mantle of White House secrecy, he was promptly and responsibly joined as a defendant once his presence became known.

In contrast, Harlow's involvement in plaintiff's situation was suspected shortly after the termination.

But as far as Harlow's participation in the conspiracy is concerned, there was no conduct known to plaintiff indicating that he may have affirmatively urged termination or prevented reinstatement to government service. Indeed, plaintiff's prime source of information during this time, Mollenhoff, apparently considered Harlow an ally. Although the evidence is disputed, active concealment by Harlow can be implied on plaintiff's version of the facts. Only much later was plaintiff able to discover what he now alleges was Harlow's true role as part of the conspiracy.

Turning to former President Nixon, the Court confronts a mass of contradictory proof. It is essential in applying the law of diligence to avoid an examination of the proof with hindsight, distorted by subsequent revelations of White House prevarications and duplicity. Undeniably, plaintiff confronted some indicia of "White House involvement" by early 1973, and he voiced certain suspicions concerning the President's role during the Civil Service proceeding. Once again, however, contemporaneous documents suggest an understandable reluctance to attribute personal knowledge and intent-to-harm to the Chief Executive himself. *See, e.g.*, letter from Mollenhoff to Nixon, Feb. 13, 1973, defendant Nixon's exhibit 52.

A personal suit against a sitting President of the United States should never be undertaken lightly, given the deference due his office and all the uncertainties as to his amenability to suit but recently settled by *Halperin v. Kissinger*, 606 F.2d 1192 (D.C. Cir. 1979). Plaintiff's former counsel apparently believed that Nixon's press conference admission of responsibility and the immediate confusing retraction provided insufficient grounds, and this Court so held when the first summary judgment motions following remand

were decided. Although tapes and other discovery now clearly justify including him as a defendant, the most energetic probing has not disclosed a basis for holding that plaintiff, with diligence, should have proceeded earlier. At most it appears plaintiff had reason to believe that Nixon had been informed of allegations regarding the injustice of plaintiff's termination and had declined to become involved. But even then plaintiff's sources felt the President had somehow been misled. Given all the contemporaneous confusion, the trail to the highest office in the land was murky and the White House continued to conceal.

The motions of each defendant for summary judgment on the grounds that suit is barred by the Statute of Limitations are denied.

/s/ Gerhard A. Gesell
United States District Judge

March 26, 1980

APPENDIX B

UNITED STATES COURT OF APPEALS
For the District of Columbia Circuit
September Term, 1979

No. 80-1406

A. Ernest Fitzgerald
v.
Alexander P. Butterfield,
Appellant
H. Robert Haldeman, et al.
(Civil Action No. 74-0178)

No. 80-1047

A. Ernest Fitzgerald
v.
Alexander P. Butterfield, et al.
Richard Nixon,
Appellant
(Civil Action No. 78-0178)

No. 80-1408

A. Ernest Fitzgerald
v.
Alexander P. Butterfield, et al.
Bryce N. Harlow,
Appellant
(Civil Action No. 78-0178)

[Filed Apr 30 1980]

BEFORE: Tamm, Mikva and Robb, Circuit Judges

ORDER

Upon consideration of appellee's motions (1) to dismiss for lack of jurisdiction, or, in the alternative, for summary affirmance and (2) for expedited consideration of his motion, of appellants' oppositions thereto, and of the District Court's request that this matter be expedited, it is

ORDERED by the Court that the motion to dismiss is granted.

Per Curiam

Circuit Judge Robb did not participate in the foregoing order.

APPENDIX C

UNITED STATES COURT OF APPEALS

For the District of Columbia Circuit

No. 80-1406 September Term 1979

A. Ernest Fitzgerald, Civil Action No. 74-0178

v.

Alexander P. Butterfield,
Appellant

H. Robert Haldeman, *et al.* [Filed July 14, 1980]

And Consolidated Case No. 80-1408

Before: Tamm and Mikva, Circuit Judges

ORDER

On consideration of appellants' petition for rehearing it is

ORDERED by the Court that the aforesaid petition is denied.

Per Curiam

For the Court:

George A. Fisher,
Clerk

By: Robert A. Bonner
Chief Deputy Clerk

UNITED STATES COURT OF APPEALS

For the District of Columbia Circuit

No. 80-1406 September Term, 1979

A. Ernest Fitzgerald, **Civil Action No. 74-0178**

v.

Alexander P. Butterfield,
Appellant

H. Robert Haldeman, *et al.* [Filed July 14, 1980]

And Consolidated Case No. 80-1408

Before: Wright, Chief Judge, McGowan, Tamm, Robinson, MacKinnon, Robb, Wilkey, Wald, Mikva, Edwards and Ginsburg, Circuit Judges

O R D E R

The suggestion for rehearing *en banc* by appellants Butterfield and Harlow has been transmitted to the full Court and a majority of the judges in regular active service have not voted in favor thereof. On consideration of the foregoing, it is

ORDERED by the Court *en banc* that the aforesaid suggestion for rehearing *en banc* is denied.

Per Curiam

For the Court:

George A. Fisher, Clerk

By: Robert A. Bonner
Chief Deputy Clerk

Circuit Judges Robb and Ginsburg did not participate in the foregoing order.

APPENDIX D

UNITED STATES CONSTITUTION

AMENDMENT I.

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

* * * * *

5 U.S.C. §7211

Employees' right to petition Congress

The right of employees, individually or collectively, to petition Congress or a Member of Congress, or to furnish information to either House of Congress, or to a committee or Member thereof, may not be interfered with or denied.

* * * * *

18 U.S.C. § 1505

§1505. Obstruction of proceedings before departments, agencies, and committees

Whoever corruptly, or by threats or force, or by any threatening letter or communication, endeavors to influence, intimidate, or impede any witness in any proceeding pending before any department or agency of the United States, or in connection with any inquiry or investigation being had by either House, or any committee of either House, or any joint committee of the Congress; or

Whoever injures any party or witness in his person or property on account of his attending or having attended

such proceeding, inquiry, or investigation, or on account of his testifying or having testified to any matter pending therein; or

Whoever, with intent to avoid, evade, prevent, or obstruct compliance, in whole or in part, with any civil investigative demand duly and properly made under the Antitrust Civil Process Act, willfully withholds, misrepresents, removes from any place, conceals, covers up, destroys, mutiliates, alters, or by other means falsifies any documentary material, answers to written interrogatories, or oral testimony, which is the subject of such demand; or attempts to do so or solicits another to do so; or

Whoever corruptly, or by threats or force, or by any threatening letter or communication influences, obstructs, or impedes or endeavors to influence, obstruct, or impede the due and proper administration of the law under which such proceeding is being had before such department or agency of the United States, or the due and proper exercise of the power of inquiry under which such inquiry or investigation is being had by either House, or any committee of either House or any joint committee of the Congress –

Shall be fined not more than $5,000 or imprisoned not more than five years, or both.